IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	
PLAINTIFF,	:	
	:	
vs.	:	DOCKET NUMBER
	:	1:18-CV-5774-AT
NANCY ZAK, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

JUNE 10, 2019

2:12 P.M.

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; June 10, 2019.)

THE COURT: Have a seat. We're here in the United States of America vs. Zak, 1:18-CV-5774. And the purpose of the conference is both to hear some argument on the motions to dismiss, as well as to discuss the preliminary report and discovery plan and the significant disputes regarding the scope of discovery in this case.

I would appreciate if counsel would introduce themselves first.

MS. HINES: Good afternoon, Your Honor. Erin Hines for the United States.

MR. ROSE: Good afternoon, Your Honor. Richard Rose for the United States.

MR. LERNER: Good afternoon, Your Honor. Matt Lerner for Ms. Zak.

MR. CLUKEY: Hello, Your Honor. Nathan Clukey for Ms. Zak.

MR. LITTLE: Fenn Little for Ms. Zak, Your Honor.

MR. KHAYAT: Good afternoon, Your Honor. Robert Khayat for Claud Clark. And with me are my co-counsel, Matthew Hicks and Ross Sharkey from the Caplin & Drysdale firm.

THE COURT: I'm sorry. Which one is Mr. Hicks? Which is Mr. Sharkey?

MR. HICKS: I'm Matt Hicks.

MR. SHARKEY: Ross Sharkey.

THE COURT: Very good.

MR. RAZI: Good afternoon, Your Honor. Benjamin Razi from Covington & Burling on behalf of several of the defendants who are here in the courtroom, Alan Solon, Bob McCullough, Ralph Teal, and EcoVest, a real estate company based in D.C.

MR. AKINS: Good afternoon, Your Honor. Sean Akins with Covington & Burling on behalf of the EcoVest defendants.

THE COURT: This is a lot of material that you have filed with the Court as a whole and still a relatively specialized area of the law. So excuse me for perhaps asking some basic questions during the course of this. But I tried to get a grasp on what is going on in this case.

And I'm going to listen to argument first on the motion to dismiss first. But it is really not clear to me from the filings exactly what is the -- you know, the closest case that the Government contends is like this case.

I mean, I know that you have had these -- provided me with materials about how much discovery has been authorized in several other cases. But I did not have an opportunity to go and see whether there have been any substantive rulings in any of those cases at this point and whether they had gone up on appeal.

So before we start talking about the motion itself, tell me is this -- are those other cases just like this. Where

have they gone? And then the defendants can also address that, as well. Or is there some other case that is the bellwether for this, or is this the bellwether?

MS. HINES: Your Honor, the United States brought this case pursuant to three different code sections under the Internal Revenue Code. They are injunction statutes. So we have the first one, which is the Internal Revenue Code Section 7402. And that is, the district court is authorized to enter an order as appropriate or necessary for the enforcement of the Internal Revenue laws.

The second code section is 7408, which is an injunction suit section. It authorizes the Court to issue an injunction when the persons have engaged in specified conduct which includes a number of penalty sections, including 6700, which is one of the primary statutes at issue in this case, and that the Court finds that it is necessary to prevent recurrent conduct.

The third section is 7407, which deals with an injunction to be issued when a person engages in specified conduct again, but it is different conduct than the 7408 count. And it deals with conduct that involves return preparation. The person needs to be a tax return preparer.

So the United States brought this case because it is -- the action is penalty conduct and enjoinable conduct. So we submit that those cases that we cited in the joint

preliminary report and discovery plan that are closest to this are those that are injunction cases.

Now, the injunction cases that we cited don't necessarily involve the same underlying transaction. It is a different type of transaction. For example, the first one in the document, ECF 80 that we filed this morning, *United States of America vs. RaPower-3*. That was a promoter injunction suit dealing with the sale of solar energy tax credits. So it is slightly different than a syndication of conservation easements. But the case was brought pursuant to the same injunction statute, 7402, 7408, and dealing with penalty conduct under 6700.

And just to talk a little bit more about 6700, 6700 describes the conduct that is subject to penalty as the organizing or selling of a plan or arrangement and the making of a statement during that organizing and selling with either a false or fraudulent statement that defendants knew or had reason to know was false or fraudulent or a gross valuation overstatement, which is a strict liability standard and doesn't impact their state of mind when they made it. It is strict liability.

The second case that we have cited, *United States vs. Tarpey*, is another promoter injunction suit dealing with the donation of time shares and charitable contributions under 170. So some similar aspects in the sense that it dealt with real

property and the donation of fraudulent interest in -- or interest in real property.

THE COURT: What's the name of the case?

MS. HINES: *Tarpey*, T-A-R-P-E-Y.

THE COURT: Where was that one brought?

MS. HINES: It is in the District of Montana.

THE COURT: Where was the first one with the Ra?

MS. HINES: *RaPower*? District of Utah.

The third case that we cited is *United States vs. Meyer*.

THE COURT: I'm sorry. I missed it. You said real property. And what was the issue with the real property?

MS. HINES: It was the donation of time shares and whether the time shares were overvalued. And the qualified appraiser issue was at issue. So several similar aspects to this case where we've got issues with donation of real property and issues regarding valuation.

The third case, *United States vs. Meyer*, was a promoter injunction suit dealing with the donation into charitable -- I'm sorry -- donor-advised funds. So charitable donations dealing with 170. It also dealt with valuation issues as well and the appraiser issues.

United States vs. Sunderlage was a promoter injunction suit. Hold on. We'll tell you exactly what this theme was.

Estate of Siegal, the fifth case, was a refund suit for Section 6700 penalties dealing with oil and gas partnerships, also involving some issues about the structure of the scheme, and some valuation issues.

As for whether there had been any substantive decisions, *RaPower* has been decided. It went to trial. The Court issued findings of fact and conclusions of law. Two of the decisions in that case are currently on appeal in the Tenth Circuit.

Tarpey went to summary judgment as to the chief appraiser. The other ones, I believe, settled and was resolved in favor of the Government.

Meyer settled. And an injunction was issued by the Court. *Siegal* settled.

And we'll -- I will have to get you a little more on *Sunderlage*. That was handled by one of our other team members.

So there are several dispositive or substantive decisions that have come out of these cases dealing with some of the subsidiary issues that we're here on today, as well the ultimate decision of whether or not an injunction should issue. And, in fact, in *RaPower* there was also a disgorgement issue that was granted in favor of the United States.

THE COURT: Well, let me ask you one other underlying issue. The Government seems to suggest that almost by definition the use of a partnership in the context of this case

is unlawful or alternatively suggestive of unlawfulness but seems to say point-blank unlawful because the conservation partnerships here are developed for the sole purpose of basically purchasing an interest in this -- in the conservation easement and obtaining also the benefit of a tax credit and tax deduction for the buyers and the members of the partnership.

But I don't really see any authority for your proposition. And I think that -- that doesn't mean that the other claim contentions are necessarily without merit as to the appraisal or their being improperly done or that they were fraudulently done arguably.

But I'm bothered by -- I have to say just to sort of start off I'm bothered by the contention that the partnerships are basically inherently a scheme that is unlawful when the entire sort of purpose of the easement -- of the statute and the allowance of this seems to be, in fact, to permit this. And I don't see anything that would say that it was unlawful. And I don't think the Government pointed me to anything that said the partnerships kind of by definition are unlawful.

MS. HINES: The United States takes issue with how defendants conducted themselves and how they have structured this scheme and that their use of a partnership structure is improper.

The landscape of conservation easement law as it is doesn't really contain a case that now currently talks about

the structure and supports this position. But in line with every other economic substance and sham case, which has been around for decades -- it is the same kind of analysis. It is whether these partners came in together to join in the conduct of carrying on a business or a joint venture. That has been around -- courts have ruled on it. It is not --

THE COURT: Well, it is different though, isn't it? Because, in fact, I mean, basically if we were only -- your position would essentially mean that only the very richest, who is an individual, would be able to buy the conservation easement. You are saying it couldn't be a collection of individuals.

But the whole purpose of the law is in some ways to allow people to get the benefit of a tax credit and to help to conserve the land. So -- but it is not because they are altruistic that they are doing this. It is not just a donation without a benefit to them. So it is different than many other situations where it is just a sham as a partnership or a corporation.

MS. HINES: I don't think it is, Your Honor. In fact, I think one of the cases we cited to you, the *Merryman vs. Commissioner* case out of the Fifth Circuit, deals with a similar kind of issue where the underlying transaction, which was dealing with the lease of an oil rig, was a legitimate transaction. But the setting up of the LLC itself for the

purpose of having partners come in and share in the deduction was found to be a sham. The partners themselves didn't really come in with the intent to join in a trade or business. They came in with the intent --

THE COURT: But there is no trade or business with conservation trusts. The trade or business is basically getting the money together so that there is a pool of people who are funding the purchase of the land and having an interest in it and getting a credit.

And I think that is very different than the situation in *Merryman*. We have a statutory structure that's set up to in some ways incentivize this conduct. Now, it may not be being handled properly in some way here. But I don't think that it just makes the partnership per se a sham.

What would be legal in the Government's view?

MS. HINES: Well, Your Honor, I do think that there are instances where a partnership may participate in a conservation easement and share that deduction. We take issue with how the defendants have structured --

THE COURT: All right. What is the situation -- what would be -- I mean, I'm just trying to be educated about this in terms of when I look at this sort of I understand what they are arguing. But I don't really understand what the Government is arguing in terms of, well, is it just simply that I actually have to have Mr. Rockefeller himself buy the land. Obviously,

the Rockefellers, the Fords, the Steve Jobs or his heirs could buy the land.

But I'm not clear what would be the partnership that could actually do this that would be lawful. Because they are all going to still be wanting just simply the credit. You are thinking that they actually have to be all basically people who say I'm totally interested in conservation and I'm only doing this because I care about conservation?

MS. HINES: Well, I think charitable contributions require charitable intent. They do require certain other elements of the statute. It is a statute --

THE COURT: What other provision? What other sorts of things? I mean, I think that there are lots of people who are giving buildings and other such things and money. But basically they really want the -- there may be charitable intent, and there may be not charitable intent. They would like to get the credit.

But I can't believe that the test here is whether you simply have actual charitable intent.

MS. HINES: Well, I think the problem, Your Honor, is that this is a preordained result in defendants' case. The charitable contribution of the conservation easement is what the whole thing is set up to do. There is no real joined together or trade or business.

The partners don't come together and actually make

this decision. It is marketed as a conservation easement. You come in. You get this deduction in very short order of four to one or whatever the ratio happens to be in that situation.

THE COURT: But tell me -- all I'm trying to do is sort of cut to the quick so we aren't here for three hours but here for two hours perhaps. Tell me -- give me an example of where the partnership -- where it would be an appropriate partnership. Because clearly there are partnerships all over the country where this is happening. And this has larger repercussions than the people who are just in this room.

So give me an example of one that is appropriate and where I'm not just going to have to go and define their intent and determine how angelic they are.

MS. HINES: If you have a situation where a partnership is already in existence where the partners own the land through a structure for some other purpose and then decided that whatever that -- they no longer wanted to run a farm or, you know, pursue development later and decide to donate a charitable contribution in the form of a conservation easement, at that juncture I believe that would be an acceptable way for a partnership to claim the deduction.

THE COURT: All right. Let's go to a completely different situation since most of the times what we're trying to do is -- my understanding with this was that you've got land. It may be something -- land by an individual farmer or

an individual who has just simply happened to own a lot of land. But he or she does not or the family does not have enough money to -- don't make enough money to make the benefit from basically making an easement and participating in the benefits of the statutory provision.

And so that were the circumstances as I understood where basically they would sell it to somebody else. Somebody else would buy the property. It is not a sale so that they could actually -- so the land would be preserved. And that is the whole purpose of this. Not for an individual who already was -- or a business that already operated that was already in a position to take advantage because of their income levels the benefits of the taxes.

MS. HINES: Well, I think that is what the United States has an issue with. They are essentially putting window dressing on the civil tax deduction, which is prohibited under Internal Revenue Code. You are supposed to be only taking the benefit of the deduction for your property. And by doing it in this form, they have created a structure that allows them to, however you want to call it, share it, monetize it, whatever. The United States takes issue with that.

THE COURT: And you don't think that is what this statute authorizes essentially in essence?

MS. HINES: No. Your Honor, 170 is very strict in what it allows. It allows for only limited circumstances where

you are allowed to get a donation and a deduction for a partial interest in property. And that conservation easement -- the qualified conservation contribution is one of those limited exceptions.

The whole focus of that is, you know, specific requirements in the code that have to comply. And the defendants, as we have alleged, have taken advantage of that, tried to insert this partnership structure to enable people who wouldn't otherwise be entitled to that deduction to claim it.

THE COURT: All right. Thank you. Is there any other authority you have for the proposition that you cannot use a partnership in this context?

MS. HINES: Your Honor, there's other partnership issues. None directly on point dealing with the easement deduction that we're aware of.

THE COURT: All right. Thank you. This was the motion filed on behalf -- there were motions for Ms. Zak and Mr. Clark. So I don't know who is going to take the lead on this.

MR. CLUKEY: I am, Your Honor. Nathan Clukey.

Your Honor, should I approach the podium?

THE COURT: That's fine.

Ms. Hines, because I threw this out of nowhere for you, it is not your fault you didn't come up. The next time come up.

I think you are better off right here. But you are -- straight ahead. So let me just jump and ask you this question. There are allegations in the complaint that when these arrangements were made and authorized -- the arrangements authorized the manager of the partnership to essentially terminate the interest in the land in the conservation within four years, five years and that, in fact, it was not an arrangement in perpetuity, which would have been as I read it required.

I mean, the whole purpose again was to preserve the land ultimately in terms of charitable purposes here. So I was disturbed about how you-all -- how you deal with that issue. And I didn't see it addressed.

MR. CLUKEY: Your Honor, I would say that is a contested fact as to whether that actually occurred, particularly with respect to the transactions that Ms. Zak was involved with. And I know this is essentially outside the complaint. But we would submit that that was not a feature of the transactions Ms. Zak was involved in.

THE COURT: All right. Did you want to respond to the issues I raised with Ms. Hines, just to throw you off and get you just -- simply so I can keep all this subject matter together?

MR. CLUKEY: I'm happy to do that, Your Honor. What specifically would you like me to address?

THE COURT: Well, you obviously understand what the Government's argument is about the questions that I posed. I wonder how do you respond to that.

MR. CLUKEY: Your Honor, we would submit that the transactions here are not like the transactions that the Government cited. I think the Court accurately stated there is no law -- controlling law here. There is no statute, there is no regulation, there is no case that says you can't use a conservation easement in connection with a partnership and allow individuals who otherwise couldn't -- so that you can conserve land that otherwise would not be conserved.

I think the *B.C. Ranch* decision specifically addresses that very issue at least conceptually, sort of broadly. The whole point of the conservation easement statute is so that you can preserve and conserve lands that would otherwise be developed. And so the conservation partnerships at issue here that my client is involved with do exactly that. They carry out that Congressional purpose.

The Government mentioned a case, *Merryman*. We would say *Merryman* is distinguishable on its facts. I think it is very clearly so. That case although extensively involved oil and gas ventures, the way that the partnership was structured was very clear that all they were doing was generating fictitious losses and allocating those losses out to the partnership. That is clearly not the case that we have here.

Here, we don't have anything that is fictitious. What we have is real land that is being preserved in perpetuity so that it cannot be developed clearly in line with the Congressional purpose.

THE COURT: So basically your argument is that *Merryman* is not on point for the reasons you've articulated and the other case -- types of cases that were -- the Government pointed to in going on the docket, which materials were provided for today, really are not analogous either?

MR. CLUKEY: That is right. That is right, Your Honor.

THE COURT: Why is that?

MR. CLUKEY: Well, I'm afraid I didn't have the benefit of looking at those as well. So I can't give you sort of chapter and verse as to why they are distinguishable. But from the very brief description that we just heard, they did not sound like the type of activity where you are taking real land, it is really being preserved, and simply that is being done within the partnership structure.

THE COURT: I, as you well know, have to take as true any allegations in the complaint. So I certainly accept your representation here that you think the facts are different than what is represented I think both in Paragraph 136 where they -- where the Government maintains that the manager of the syndicate had the ability to dispose of that only asset, the

land, without the approval of the partners after a period of years after the conservation easement is granted.

And I think that also is represented in Paragraph 82 where the term of partnership was to be five years and that the manager of Partnership Y had the authority to sell or dispose of the real property, Partnership Y's only asset, within four years of the conservation easement being granted.

So that is the Government's representation. I don't know whether it is true or not. But I have to accept it as true for purposes of -- in a civil case for purposes of reviewing the motion to dismiss.

And wouldn't that seem to void basically my capacity simply to assume that this is not a scheme and a fraud?

MR. CLUKEY: Your Honor, at Paragraph 62 of the complaint --

THE COURT: Yes.

MR. CLUKEY: -- the Government alleges that the transactions evolved over time. They don't say exactly how they evolved over time. This may be one of the factors in which the transactions evolved.

Ms. Zak was not involved in -- according to the Government's allegations, there are three example transactions. There is one from -- it is a span of a couple of years that the Government talks about. But 2009 to 2011. And there is one around 2012. And then there is one that started in 2015.

So the Government itself says in the complaint the transactions evolved over time. It doesn't specify how they evolved, when they evolved. So it is possible that everything the Government is talking about here relates to the 2015 transaction. There are no allegations in the complaint that the 2015 -- that Ms. Zak was involved in the 2015 transaction. And that is one of our core issues and why we filed the motion to dismiss because of this amalgamation, this conflation of various activities, and the lack of specificity throughout the complaint so that it is really not clear where a lot of these allegations to which transactions they actually relate.

When the Government alleges that Ms. Zak was involved in 42 transactions, there were 96 total. So this could relate to the remaining 50 or so -- 54 transactions. So I think there actually is room for the Court there to not have to accept that allegation with respect to Ms. Zak.

THE COURT: So Ms. Zak's position is that the Government has to make allegations as to every single one of the 99, or it has to differentiate between those that she's involved in versus those that some other set of the defendants are involved in?

MR. CLUKEY: Yes, Your Honor. To answer the first question, no. Clearly, the case law in the Eleventh Circuit would not require the Government to allege facts with respect to all 96 transactions. The case law certainly will allow the

Government to have representative transactions when you are talking about conduct that has occurred over a span of time. Clearly, we recognize that.

What our position -- what we take issue with is the fact that there are only two transactions that allegedly concern Ms. Zak, one that is basically a decade ago and one that is seven years ago.

THE COURT: Which ones are those?

MR. CLUKEY: These are in the brief.

THE COURT: Are they the -- they get different letters here. I'm just trying to understand which ones are they here.

W, X -- Partnership Y, Partnership Z?

MR. CLUKEY: I believe it is Partnership Y and Z, Your Honor. It is those transactions that the Government alleges Ms. Zak had involvement with. The later one -- I think it is the W and -- I can find it.

It is Partnerships X and W. Those begin around 2015. It is those transactions. There are no allegations in the complaint that Ms. Zak had any involvement with those particular transactions.

And then the other two transactions -- the other two example transactions are the ones the Government alleges Ms. Zak had some involvement with. And the issue that we have there is, you know, with respect to 9(b) and the requirements

there for alleging fraud the lack of specific information that goes specifically to Ms. Zak and the false statements that she allegedly made, to whom the statements were made, when the statements were made, when the statements -- where they occurred as well. So we think all of that information is missing and would contend that that level of specificity is required under Rule 9(b).

THE COURT: And that would be as to the particular partnerships that she -- that are used as representative ones from 2009 and 2012?

MR. CLUKEY: Exactly, Your Honor. And whether two is enough or there should be more when you are talking about 96 transactions, potentially there should be more given that this conduct occurred over a span of time. And one would think that the Government would also be required to give some examples over a period of time. But at a minimum, even if two were enough, we don't believe that the Government has alleged enough specificity with respect to those two transactions.

THE COURT: Well, again as to Y, as I pointed out in Paragraph 82, which was apparently before 2015 -- this is one of those that deals -- that the manager had the authority to sell or dispose of the real property, the only asset, within four years of the conservation easement being granted.

And if that were true, it would be -- it would seem to me to defy the notion of conservation. Because if they

could sell the asset, the real property, then there has not really been conservation if it could just be done within four years. It is just I get the credit and we sell the property. It is not in perpetuity.

MR. CLUKEY: Right. And as I would just reiterate --

THE COURT: All right. Ms. Zak had a seminal role, did she not, in packaging these though? I mean, this is what is described as a whole. But you are saying you want to know more specifically what she's alleged to have said to whom in each of these? What brochures she might have issued or letters she might have issued under her own signature?

MR. CLUKEY: Your Honor, with respect to Count I and Count IV, given that both of those counts are premised on allegations of fraud -- you've got Section 6700. The Government invokes that for both of the counts. Section 6700, as Ms. Hines just explained, concerns tax statements that the speaker knows or has reason to know are false or fraudulent. Those clearly sound in fraud.

There are also general allegations of fraud throughout the complaint that are tied to Count I and Count IV. And the Government assumes arguendo that Rule 9(b) applies to some of the counts in the complaint, presumably those. Although it doesn't specify.

But given that Rule 9(b) should apply to those counts, then yes, Your Honor, we contend that the Government

has not provided the level of specificity as required under 9(b). And 9(b) requires more than just a general allegation of fraud that is untethered in time and place and doesn't give you who the speaker is and doesn't tell you who received the information.

When you look at the count -- when you look at the complaint throughout, we acknowledge that there certainly are some general allegations of fraud with respect to Ms. Zak. But there is not the level of specificity that 9(b) would require as to each of those various elements when you kind of walk through what is required under the law in the Eleventh Circuit.

THE COURT: So you have moved to stay discovery pending the resolution of your motion. It seems hard to conceive that some of this isn't moving forward -- of the claims here. And even acknowledging what you have said -- and certainly under the local rules, EcoVest's answer -- we can have at least an answer for one or more of the defendants. And I'm certainly authorized to allow it to proceed.

So what is your -- sort of the essence of your contention of why I should stay discovery pending that, even if I allow -- even if I ordered them to -- the Government to proceed to file an amended complaint but it is not specific enough?

MR. CLUKEY: Your Honor, the essence of our contention is or the bases for our relief are really set forth

in the law of the Eleventh Circuit that says as a general matter when you have got a motion to dismiss that is pending then discovery shouldn't proceed. But we, of course, recognize that the Court has discretion to control its own docket. And this obviously would fall within that -- within that ambit.

We do not oppose discovery certainly continuing or proceeding with respect to EcoVest. We came up with a proposal. We met with the Government during the initial conference. And we proposed something along the lines of why don't -- why doesn't discovery continue with respect to EcoVest. It wouldn't continue with respect to Ms. Zak.

And even things like depositions could continue. And then we would either attend or not attend the depositions. And then discovery with respect -- the depositions of Ms. Zak and her employees, those would wait until the Court had had a chance to resolve the issues as to her.

THE COURT: And did you reach any agreement on that?

MR. CLUKEY: That was our proposal. The Government did not accept our proposal, Your Honor.

THE COURT: All right. Wouldn't you just have to come back if I were to accept that proposal, that you would -- if you weren't participating in depositions and then you ended up having to cover the same territory, wouldn't it potentially be very duplicative?

MR. CLUKEY: Your Honor, we recognize that. And I

think part of the compromise that we come up with is that we -- I think we would attend the depositions. And if we didn't attend them, we could concede that they could be used against us or something like that in order to try and minimize the cost to all the parties.

THE COURT: All right. So when I look at your motion to dismiss, we have the particularity issue; we have the partnership issue, which we have talked about; and then we also have the issue that Ms. Zak does not prepare appraisals in Count II.

And this is a little bit back-ended. But I wanted you to explain to me what your response to the Government's position is on that -- on that count.

MR. CLUKEY: So with respect to 6695A, we think that the words of the statute are very clear that it doesn't apply to somebody who prepares appraisals. We understand the Government obviously has alleged -- gone beyond that and says Ms. Zak assists in preparing appraisals. But the statute itself does not cover persons who provide assistance.

So on that basis alone, we would submit that that count should be dismissed. The Government cannot insert words into the statute. There is a case I believe that we cite in the brief by the Federal Circuit, *Energy East*, that says exactly that and says even a Court can't insert words, even if it wants to, in the statute. And doing so would be quasi

legislative action. So therefore we don't think the Government can do it.

In addition, we think the surrounding code sections right around 6695 -- that they reaffirm this notion that 6695A does not apply to persons who provide assistance. And the particular code sections I'm thinking of, Your Honor, is Section 6700(a)(1)(A). And that does expressly apply to somebody who, quote, assists in the organization of a particular entity. And Section 6701(a)(1) applies to any person, quote, who aids or assists.

And we note this in the brief, Your Honor. But a well-known canon of construction, expressio unius, says, where Congress has included particular language in one section of a statute but then omits it in another section of the same act, it is generally presumed that Congress has acted intentionally and purposely in its exclusion.

THE COURT: Well, I understand this argument. I guess what -- I was imprecise in my question. The alternate argument in the response brief provided by the Government is that Count II was also premised on 26 U.S.C. Section 7402, which does not according to the Government require a violation of a specific code section before a Court is authorized to issue an injunction.

So even -- the Government argues that even if Zak's role in assisting in appraisals of conservation easements is

found not to be subject to Section 6695A, an injunction under 7402 with respect to the conduct alleged may still be necessary or appropriate to enforce the Internal Revenue laws.

Do you have any disagreement with that is what I was trying to get at. I'm sorry for not being more precise.

MR. CLUKEY: Yes, Your Honor. We do have disagreement with that. When you look at Count II in the complaint, the title to Count II says injunction against defendants Zak and Clark under 26 U.S.C. 7402 for engaging in conduct subject to penalty under 26 U.S.C. 6695A. So the entirety of Count II is premised on conduct subject to 6695A.

I understand the Government's argument that 7402 is a very broad statute and they otherwise may have jurisdiction to make a different claim against Ms. Zak in connection with providing assistance. But it hasn't done that in this complaint. And therefore we would request that Count II be dismissed because the Government has not pled what it is saying it potentially has the power to do.

THE COURT: All right. Thank you very much.

MR. CLUKEY: Your Honor, would it be possible to also address disgorgement and the statute of limitations?

THE COURT: Yes.

Now, I had another case involving *Kokesh* since its announcement. So it has not been in the context of these circumstances but in a securities context.

But do you have authority for thinking that we could jump over here to this context to apply *Kokesh*?

MR. CLUKEY: Yes, Your Honor.

THE COURT: Go ahead.

MR. CLUKEY: 2462 sets out a general statute of limitations, as you know -- five-year statute of limitations that applies to any case that involves the enforcement of a civil fine or penalty or forfeiture. *Kokesh* very fortunately provided an approach that can be used by the court in any case to determine whether the particular disgorgement action at issue constitutes a penalty.

That is because the principles that underlie the court's approach in *Kokesh* were not limited to the securities -- to securities matters. Two of the key illustrative cases that the court relies on in *Kokesh*, *Brady vs. Daly* and *Meeker vs. Lehigh* -- both of those occurred outside of the SEC enforcement context.

The first one, *Brady*, was a copyright suit. It was a copyright suit against a playwright against another playwright who ripped off the first playwright's -- an idea from his play. And then the issue there was whether the remedy that was -- it was the federal copyright statute. And the federal copyright statute provided for $50 a day or something like that for every day you were infringing -- whether that constituted a penalty.

The other case, *Meeker*, involved a railroad company

and a shipping company. And the ICC gave some relief to the shipping company because it had been disparately treated. And the railroad argued that that relief was subject to the predecessor to 2462 and constituted a penalty.

So *Kokesh* lays out basically a three-part test that can be used. And that -- it is effectively a three-part test. The first part of the test concerns the infractions of public laws. The second part relates to whether disgorgement is imposed for punitive purposes. And the third part asks whether the relief sought is purely compensatory.

As to the first factor, the Court looked to whether the violation was against the United States or was against an individual. And the *Brady vs. Daly* case is a really good example because there you had two individuals who were involved. The violation was against an individual. And although it was a federal statute that was at issue, it wasn't a violation of public laws because it wasn't against the United States.

THE COURT: Well, you would agree here we have a situation where it would be -- the Government contends this is about public law.

MR. CLUKEY: Absolutely, Your Honor. So we would contend that we meet the first factor under *Kokesh* as to whether the disgorgement sought here is a penalty. We would meet that first test.

For the second factor and whether disgorgement is being imposed for punitive purposes, disgorgement is being brought for deterrence by the Government. We think that is evident from the fact that the Government seeks to have defendants, quote, disgorge to the United States the gross receipts that they received from any source as a result of the conservation easement syndication, plus interest. That is from Paragraph 7 in the complaint, Your Honor.

The complaint therefore seeks everything that the defendants have earned in connection with conservation easements with no deduction for expenses, plus interest on top of that. Surely the object of the disgorgement claim is for deterrence.

In any event, the Government acknowledges that disgorgement is being sought in this case at least partly for deterrence. It says in its opposition to the motion to dismiss at Page 26, disgorgement under Section 7402 can be viewed as serving compensatory purposes to the United States while also serving deterrent purposes.

Now, plaintiff claims that the fact that it is partly seeking deterrence for the disgorgement claims is not fatal. But we would submit it is fatal with respect to this second part of the test under *Kokesh*. That is because *Kokesh* explained, quote, a civil sanction that cannot fairly be said solely to serve a remedial purpose but rather can only be

explained as also serving either retributive or deterrent purposes is punishment as we have come to understand the term. And that is from *Kokesh*, 137 S. Ct. at 1645. And that is quoting an earlier Supreme Court decision, *Austin vs. U.S.*

And so we would contend even if disgorgement is not the primary purpose, since the disgorgement here is for deterrence at least in part, it is not solely remedial and therefore it is punitive. And so we would also satisfy the second aspect of the test.

Then, finally, the disgorgement sought by the Government is not compensatory, let alone purely compensatory. The Government claims that the disgorgement here is, quote, remedial in nature because it restores the parties to the status quo. That is at the Government's opposition, Page 26.

That is exactly the same argument that the Government made in *Kokesh* and the Supreme Court rejected. There, toward the end of the opinion, the Supreme Court looked at that, what disgorgement was providing and the various types of ways that the SEC often got with disgorgement. And it noted that in some cases the SEC sought gross receipts.

And it noted in that case the defendant can't deduct expenses and as a result the defendant would be worse off given the disgorgement. And then by its very nature, that had the characteristics of a penalty.

That is exactly what the Government has done here.

The Government seeks gross receipts with no deduction for expenses, plus interest. So it is exactly what the Supreme Court addressed in *Kokesh* that the Government is seeking here and that by its nature is punitive.

In addition, the Government isn't asking for taxes that it alleges have been underpaid by virtue of people participating in these particular transactions. The Government acknowledges in its opposition it can go after all of the individual partners if it wants to. It can audit them, and it can seek the taxes.

That relief if the Government were to do that would be compensatory. By contrast, here we have an entirely different situation where the Government is going for gross receipts. And that is not compensatory in that sense.

THE COURT: What would gross receipts look like here then? I'm just trying to understand this more.

MR. CLUKEY: Your Honor, I'm afraid I'm not in a position to sort of give you chapter and verse as to what the --

THE COURT: Well, I'm just trying to understand what that would actually -- what would be the distinction here in this type of operation where I don't know that there are all sorts of expenses.

MR. CLUKEY: So I can say that there are -- I can address that issue. There are a lot of expenses that are

involved. Ms. Zak, for instance, has employees. So she runs a business. So she has all the expenses you would have in operating a normal business. So the Government is saying here you don't get to deduct any of those expenses. Over the course -- they are asking for a decade of relief. You don't get to deduct any of those expenses.

The one last thing I would say, Your Honor, is the Government says, well, it is compensatory because we've conducted this investigation. So we get to be compensated for that investigation. But that is exactly the same thing that happened in *Kokesh*. The SEC conducted an investigation. And all agencies conduct investigations, but that doesn't make the relief that you are seeking compensatory.

But for all three of those reasons, Your Honor, we think that we meet the effectively three-part test that *Kokesh* sets out. And therefore we would request that the Court apply Section 2462 to the Government's claim for disgorgement.

THE COURT: All right. Just hold for a second because I had another question regarding your argument on this section.

(There was a brief pause in the proceedings.)

THE COURT: Explain to me how the injunction provisions and the disgorgement provisions would be reconciled then in the statute with the normal IRS provisions for basically requiring repayment and having the compensatory

relief.

Would there be a circumstance where you could seek disgorgement?

MR. CLUKEY: I'm sorry, Your Honor. I'm not following you.

THE COURT: You are basically saying disgorgement is not a viable remedy in the context here, as I understood your brief.

MR. CLUKEY: So yes, Your Honor.

THE COURT: Maybe I misunderstood something. But that is what I understood.

MR. CLUKEY: Certainly. I'm sorry I didn't understand.

THE COURT: It is not a legally viable remedy. But it is obviously identified as a viable remedy in the statute, such as a regulation. So I'm just trying to understand for enforcement purposes then in what circumstances can you do disgorgement if you can't do it in this context. What am I to understand from all of that?

MR. CLUKEY: So, Your Honor -- right. So in addition to the -- I'm sorry I was confused. I was thinking about the statute of limitations.

Apart from the statute of limitations issue and more broadly, we have asserted obviously that the --

THE COURT: Because I could understand the statute of

limitations. That's simple by comparison. But you are making a broader argument.

MR. CLUKEY: Right. So, Your Honor -- so I think there is a good basis for us asserting that. At this point in time, what I would suggest is potentially given the possibility that even if the Court were to dismiss the complaint as to Ms. Zak the Government may be allowed to replead and we may ultimately be still back in front of you at some point in time.

It might be a better time to address this issue during summary judgment. Although we brought it up at this point initially, it might be better addressed when there are certain facts around to support it -- that particular argument.

We think it is a viable argument. I believe that EcoVest -- counsel for EcoVest is going to address it because the Government has moved to strike it entirely, the fact that it is not a viable -- the defense of it not being available. The Government's moved to strike that, and I believe EcoVest is going to address that actually in full.

THE COURT: All right.

MR. CLUKEY: So in that sense, Your Honor, it may make sense actually to defer consideration of that issue.

THE COURT: All right. Does EcoVest wish to address that point or not?

MR. CLUKEY: Thank you, Your Honor.

THE COURT: Thank you very much.

MR. RAZI: Your Honor, we certainly do within the context of the Government's motion to strike all of those defenses, if the Court wants to hear about that.

THE COURT: Well, just while we're on it, yes, go ahead and address that. Thank you.

MR. RAZI: Thank you, Your Honor. Benjamin Razi. Motions to strike defenses are disfavored in this court and really all federal courts across the country. It is sort of doing litigation backwards. You don't -- you know, you don't start whittling away at a party's defenses until you put on your case and get to prove your claims.

So this was a wasteful unnecessary motion that has delayed the case. There are a number of viable defenses to this case. So --

THE COURT: That is your principle -- I'm assuming we're at the general principle. I just wanted to sort of follow up: Was there anything -- it is one thing to say *Kokesh* defines a different statute of limitations potentially here, which is a question of whether it wipes out disgorgement under the facts here. If there is anything else you wanted to address about that.

MR. RAZI: Well, I would say there is no way in the world that it would be fair to strike our defense that disgorgement in this case, the remedy that is sought, is unconstitutional, for instance, under the Excessive Fines

Clause. As the Court is well familiar, any -- any fine, any penalty needs to be proportionate to the conduct. So that is one point that we have made that hasn't been addressed. I just want to be very clear before we start going too far with these rulings. There are going to need to be facts presented about that.

And the Court alluded to another important factor. There is a whole regulatory regime here. There is a Government agency that is not in the room. But their job is to do this stuff. And that is the IRS. And they are doing it. They are auditing the transactions that my clients were involved in. We disclosed these transactions pursuant to this IRS listing notice. We routinely disclose them, and there are assessments and payments, and there is a whole regulatory process.

So yes, there is no way in the world you can jump under the statute to just start disgorging the gross proceeds of people's business before you apply the tax laws the way they are written.

So under *Kokesh*, way premature to deal with that now. And that is our argument. I'll be happy to address it more.

THE COURT: Thank you very much.

MR. HICKS: Your Honor, Matt Hicks for Claud Clark. So on disgorgement, I think it is important if we could get a ruling on the five-year statute of limitations argument because that will affect discovery. So to the extent that there could

be less discovery, that would be great.

As for the Eighth Amendment, excessive fines, I agree that is something that will have to be addressed in light of the facts.

The one thing that I would say on -- actually, sorry. An initial matter, in my papers to you, I said that my colleague Sae Jin Yoon would argue. She had a conflict at the last moment that prevented her from being here. So my apologies for that. I'm here.

And so to the extent that you're interested in hearing why my client is not a tax return preparer, I would like to have my colleague, Ross Sharkey, argue it. He is smarter than I am. He was a tax court clerk. He can address it better.

But on the disgorgement front, something that I want the Court to be aware of in deciding that is -- and I don't think -- it is not in *Kokesh*. I don't think it is in any case. But it has to be -- in determining whether or not it is punitive or there is a deterrent purpose, it has got to be an objective standard. It cannot be a subjective standard. It can't be that we're going to say to the Government, whatever you say is in your mind is what we're going to accept.

And so, for instance, in this case, the Government has admitted that there is at least a deterrent purpose. So that is the end of it under *Kokesh*. Because as long as there

is some deterrent purpose, then that second part of the test is met. So we don't have to go too far into it.

But just as an example, there was a press release in this case. Under DOJ policy in general and under how the tax division uses press releases, those are meant to have a deterrent effect. I used to be at DOJ tax. I was on the civil side. But certainly on the criminal side and the civil side, there are only so many cases brought a year. One of the ways that you keep a voluntary compliance tax system running is with press releases.

Normally I would prefer them at the end of the case after there have been findings of fact. But that was meant to have a deterrent purpose. If the Government were to say no, no, we didn't mean to deter, that would be an objective piece of evidence that the Court would have to consider as to questioning whether or not there are subjective -- their expression of subjective intent is correct.

I think we can just avoid the whole thing. And I think in going forward in *Kokesh*, courts ought to be deciding it on an objective basis, which objectively speaking is deterrence one of the goals here.

All right. You were asking about stay -- whether we should stay discovery. I agree with Mr. Clukey that at the Rule 26(f) conference we tried to arrive at a compromise that would allow EcoVest and the Government to continue on discovery

on their own grounds while holding it in abeyance until you were to decide our motions to dismiss.

I think that it is actually possible -- what we said was -- and to make clear -- Mr. Clukey said this. But we said, look, go ahead and proceed with EcoVest. That is fine. But keep Clark out of it. To the extent that you need to take depositions, we'll show up. We'll participate. You're not going to have to do them again.

Our goal was not to try to throw a monkey wrench in. Our goal was to try to allow the parties to proceed who wanted to proceed and the parties who didn't want to proceed could wait until you made a ruling.

So, for instance, you have seen that we've moved to dismiss all but one count. All right. Well, here is why it matters. So for the -- the one count is -- for us that we're not moving to dismiss is that Claud Clark is an appraiser. Yes, he is an appraiser, absolutely. So we're not going to move to dismiss that.

We do need more specificity in the pleadings. So let me state it as plainly as I can: My client is an appraiser. He appraises the value of the conservation easements. The Government says in this instance -- in this instance, he appraised it at X or Y or A or B. The complaint does not say, but actually the value was this, or he used the discounted cash flow method, but actually that is the wrong method, he should

have used this method, or, he didn't look at historical comps. Which comps?

This injunction action has been brought against a backdrop where not only has the IRS not asserted any penalties against my client the things on the scoreboard are in my client's favor. So we refer to Kiva Dunes. And people refer to my client as Mr. Kiva Dunes. It is a tax court case. The question there was whether a conservation easement was worth what the taxpayer said it was.

Okay. He did the appraisal. The tax court, specialist court in tax, sided with my client, said Mr. Clark is right. There is another case Pine Mountain -- Pine Barrons -- Pine Mountain where his valuation was again at issue. And the Court actually decided it is worth more -- slightly more than Mr. Clark said.

So we have a situation where there's no court decision against my client's valuation. The IRS audited my client in the beginning of 2017, and I represented him during that. We gave them everything. We were cooperative. We said, if you don't like an appraisal, if you don't like three or five -- take the ones you don't like the most, we'll sit down with you. We'll hash them out. Either there will be a problem, or there won't be. We will agree, or we won't agree. We can hash it out.

The IRS did not do that. They asserted no penalties

against my client. And the next thing we heard after that audit started and we cooperated was a call from a reporter to my client saying, would you like to comment on the case that was brought against you.

So it is not a situation -- normal situation where the IRS has asserted penalties against the appraiser and the appraiser is on notice that something he is doing is wrong. He is not on notice. And this complaint doesn't make it any more clear. They just say he overvalued.

Well, okay, under *Iqbal* and *Twombly*, we need a little bit more. You say my client was negligent. How was he negligent? Same thing. You say then you overvalued. How did he overvalue? Speaking in broad strokes isn't sufficient. And the sooner we clear that up the better because, otherwise, the discovery process is going to be similarly abusive in the way that the complaint is vague.

That is why we think you ought to stay discovery for our guy. And we'll do everything that we can. And we think that the Government and EcoVest can continue on their tracks.

The only other issue I think is that an appraiser is not a tax return preparer. If I may, I'm going to let -- do you have any questions, Your Honor?

THE COURT: Well, I think that it really only relates to the Government's response here is that even -- as I understand it, even if under one section of the code he is not,

the fact is that for purposes of relief they can still -- they still reach -- his conduct is still reachable.

MR. HICKS: So at the motion to dismiss stage, you take their allegations as true. And if we have a situation -- I can certainly imagine a set of facts where an appraiser is a tax return preparer. Right. He is a CPA. He is also an appraiser. He wears both hats. He does both things.

And on those particular facts, you say, okay, sorry, we're going to have to use a tax return preparer.

COURT REPORTER: I need you to slow down, please. Thank you.

MR. HICKS: Absolutely. It is the coffee. It is all I have had today.

So you appraise the value of the conservation easement, Mr. X. But you also help prepare the tax return. But I mean, certainly on those facts, you could have an appraiser who is a tax return preparer.

THE COURT: Because on Page 22 of the Government's response, they say, you know, an appraiser might be subject to penalties under Section 6694 as a non-signing tax return preparer if the appraisal is a substantial portion of the return or claim for refund and the applicable standards of care under 6694 are not met.

MR. HICKS: So I'm going to say one last thing, and that will be it so I don't get myself in trouble. And I will

let my colleague answer. It appears to be that the Government's argument is this: If the deduction is compared to the rest of the return really big, then the appraiser is a tax return preparer. That absolutely can't be the answer. The appraiser prepares the appraisal report. He doesn't render tax advice. His job is to figure out what it is worth.

Does he sign a form that goes on the tax return? Absolutely. Why does he do that? He is legally obligated to. So the Government's argument is this: If an appraiser is legally obligated to sign that form and if the number is big enough, then he's a tax return preparer.

The problem with that argument fundamentally is that's not the appraiser rendering tax return -- tax advice. Excuse me. Tax advice.

A little bit of background, the IRS has a challenge when it comes to valuation. When it is a deduction, the IRS is concerned that it has been overvalued. When it is on an estate tax return, they are concerned that is undervalued. Right. That Tiffany jewelry, that Picasso, you have undervalued it for purposes of the estate tax return and you are cheating the fisc.

So as a matter of enforcement, it is very difficult for the IRS to deal with undervaluation in the estate tax context or overvaluation in the charitable contribution or any other contribution -- excuse me -- charitable contribution

deduction. That is because valuation, at least of land, is a local game. You have got to be on the ground. You have got to know what is happening there. You have to see what the local comps are. It is all local.

The IRS only has so much money to put towards enforcement. They can't have an appraiser in every county in the nation. So they do a lot of what are known as desktop appraisals where the IRS appraiser in Chicago is at his desk and he pulls what he can get remotely. But he never actually touches the ground. It is an enforcement challenge for the IRS.

It is generally one that there is no way around because that is how valuation is done. It is a local process. This injunction case is a bellwether. Okay. We're totally agnostic about whether the partnerships work. My client is an appraiser. It is none of our business. Okay. He doesn't have an opinion on it. But it is a bellwether. There is no law for this.

May I call my colleague up?

THE COURT: Yes. But I don't need to hear much. You can say a few minutes but no more.

MR. SHARKEY: Hello, Your Honor. Ross Sharkey. Yeah, I'll be quick and echo what Matt said. The hook in being a tax return preparer is rendering tax advice. And the focus, the tax return itself, in these cases is going to be the

individual 1040s of the partners of the conservation partnerships. And in that regard, I think the *Goulding* case, which we have discussed in our papers and I won't get into too much, provides a nice analog because it deals with an attorney and a CPA who was the paid preparer, organized, filled out the partnership return, filled out the K-1s, gave it to the partners, passed it through, and said, you know, this is the tax result of the transactions the partnership undertook.

And the Court in *Goulding* and the Seventh Circuit affirmed found that he was a tax return preparer of the individual partners' returns because he provided advice with respect to those items. And those were the items that led to the deficiency.

In this case, Mr. Clark is providing an opinion of value. He's not providing tax advice. There are enumerable requirements in Section 170, in addition to there being some kind of value in the property donated, that must be met and satisfied for the deduction to be valid and pass through. And he doesn't opine on any of those.

And the Government doesn't allege that he does -- in the response to our brief, the Government acknowledged that the only misstatement that they allege with respect to Mr. Clark has to do with valuation.

THE COURT: Well, then they just simply say -- that is what I'm just going after is that, again, that the Treasury

Department -- that there are regulations -- cited to the Treasury regulations in place since 1977 whereby an appraiser might be subject to penalties under 6694 as a non-signing tax return preparer if the appraisal is a substantial portion of the return or claim for refund. So that seems to open a whole other floodgate.

MR. SHARKEY: To be clear, the regulation --

THE COURT: I just was trying to understand your position about that.

MR. SHARKEY: Certainly. And the regulation in place doesn't mention an appraiser specifically. They are just saying we can think of an appraiser who would fit that definition. In the current regulation, the definition of a substantial portion of a tax return requires that tax advice be rendered.

So it is -- you know, that is -- the step to be a tax return preparer is rendering tax advice. And like Mr. Hicks said, I could imagine a situation where an appraiser both appraised property and also rendered tax advice with respect to, you know, how much of the donation was deductible, that all of the other requirements under 170 were met.

But that is not the case here. And the Government hasn't alleged it. To the contrary, they have only focused on valuation, which isn't tax advice.

THE COURT: Okay. Thank you very much.

MS. HINES: Thank you, Your Honor. I'm going to start with Zak's motion to dismiss and a few responses to that --

THE COURT: Okay.

MS. HINES: -- if that is all right.

THE COURT: Fine.

MS. HINES: So the first basis for Zak's motion to dismiss is based on Rule 9(b). And I think that we assumed arguendo as pointed out by opposing counsel that Rule 9(b) applied for purposes of responding to the motion. But I think it is important to point out that the code sections under which we have sued and are seeking relief do not require the Government to prove fraud. It is an important distinction.

So 7402, the standard is whether it is appropriate or necessary for the enforcement of the Internal Revenue laws. 7408 deals with 6700, which as we talked about requires making of a false or fraudulent statement that the defendant knew or had reason to know. So there is an objective standard built in there that doesn't require the Government to prove a fraudulent --

THE COURT: I think that even though it expressly is referring to fraud it doesn't basically imply that 9(b) would be applicable? That seems to be a pretty peculiar position.

MS. HINES: Well, as Zak's motion points out, there is only one case that Zak could find where it directly deals

with whether 9(b) applies to 6700 cases.

THE COURT: An Eleventh Circuit case.

MS. HINES: No. The *Hempfling* case was an Eastern District of California case.

THE COURT: Right. But they do refer to an Eleventh Circuit case in terms of the applicability of a different provision, and that didn't even use the word fraud.

MS. HINES: Your Honor, they refer to *Carlson vs. United States*, which is a refund of a 6701 penalty suit, which is not a section at issue in this case. 6701 actually does require explicit fraud. It requires knowing. So it is a distinct statute with a distinct level of proof that is required.

Regardless of whether --

THE COURT: So knowing implies fraud; but when the statute says fraud, it doesn't imply fraud?

MS. HINES: It says false or fraudulent statement that they knew or had reason to know. So it can be false, or it can be fraudulent.

THE COURT: But you've really -- but when I look at your allegations, you have pled fraud at points and you have said -- you have used the word fraud.

MS. HINES: We used the term fraudulent eight times in our complaint every time coupled with false -- false or fraudulent. And false is the primary basis under which we have

made the allegations and included it 17 times in our complaint.

But regardless of whether you have to decide that -- you may not. Because the Government has pled the circumstances with particularity. This is a scheme that has lasted since 2009 as alleged by the Government. We have alleged the who, the what, the where, the when, the how of the conduct that we think is enjoinable conduct.

Ms. Zak takes issue with the fact that we only have two examples. But Rule 9(b) doesn't require that we allege the particulars of every single transaction nor does it require us to prove our case. In fact, opposing counsel when up here arguing talked about a contested fact. We're not at a contested fact stage. In ruling on a 9(b), we're looking at the allegations of the complaint assumed as true.

I want to touch briefly on one of the points that opposing counsel made in their motion talking about the evolution of the scheme. The United States alleges that the scheme evolved over time. And if you look at not just Paragraph 61 but then Paragraph 62, we have given some context of how this scheme has evolved over time. It includes involving a multitiered entity structure.

THE COURT: Is that a meaningful evolution in that that has been, generally speaking, a development in business as a whole in the United States in terms of legal relationships? Lawyers and law firms are ever more creating additional layers.

And that is -- you know, we're just simply not the way people organize business legally in the '60s, '70s, or even '80s.

MS. HINES: And I think it is there to give context for when we go into the examples. Because the example Partnership Z starts with 2009. You have got like the one level of the tiers. And then in 2012, you still have the one.

But then, you know, we got to the 2015 example, and you have two partnerships. So trying to give some guidance as to why the examples look different and try to like help the Court or anyone understand what we're getting at with these.

THE COURT: I'm just trying to understand does it actually raise any inference as it is perfectly appropriate and helpful to include the information. But I'm not sure I can draw any inferences from it. That is all. But it is appropriate to include -- have included the information.

MS. HINES: And I think, Your Honor, you pointed out a couple of the particulars with respect to Ms. Zak. And in the examples, there were specific allegations that relate to the more general allegations of the pattern of conduct engaged in by these defendants.

So the United States has alleged that all defendants have engaged in this pattern of conduct since 2009 and then laid out those specific examples. And so by laying out both the general and the specific, we have met the particularity standards.

We have told Ms. Zak, Mr. Clark, and the EcoVest parties what it is that we are complaining of. We have met the purpose of 9(b), which is to alert the defendants as to the conduct and to give them notice and to prepare an adequate defense.

And, in fact, I think the motions themselves, the motions to dismiss by Mr. Clark and Ms. Zak, they already have a defense articulated. Their defense is we didn't do anything wrong. So they have seen what it is we're complaining of and have been able to formulate a defense.

I think the next issue that you took up with Ms. Zak's motion was the 6695A count, Count II, injunction under 7402. The United States alleged conduct that we believe satisfies that she has prepared an appraisal, that the context of the complaint and all of the allegations contained therein allege that she, in fact, prepared an appraisal.

So at this point in time, anything else in talking about she didn't actually prepare it -- that is a fact that would have to come through on the merits. That is not something that is appropriate at the 9(b) stage.

THE COURT: I think I have the greatest problem with the Government's position frankly on Count II. I don't think I can really -- you are going to have to explain to me why I shouldn't basically construe the statute as written. It doesn't use the word assist.

MS. HINES: Well, it uses the word prepares. And the way that the allegations in the complaint are written -- and there was a primary focus on Paragraph 193, which talks about how she assisted in the highest and best use determination, which is an integral component of the appraisals.

The next two paragraphs after that right in context talk about Defendant Zak and Clark knew or reasonably should have known that the appraisals they prepared would be used in connection with the federal tax return or claim for refund. And then 195, the appraisals that were prepared by Zak and Clark provided the basis for the value of the charitable contributions deduction claimed on each conservation easement syndicates' forms 1065 that passed through to the individual customer's tax returns or claims for refund.

And the remainder of the count right in context and then with the earlier paragraphs of the complaint where we have made the allegations of the specific conduct again that she prepared this highest and best use determination, that is part of preparing an appraisal.

THE COURT: So an appraiser is not a legal term of art? You don't have to be an appraiser? Anyone can be an appraiser? I mean, the Government can call anyone an appraiser under your view?

MS. HINES: I think the way 6695A reads talks about a person who values property. It doesn't specifically say it has

to be an appraiser subject to state licensing or subject to USPAP. It is a person who is valuing property. And conducting that particular behavior and conduct is potentially subject to penalty.

THE COURT: It doesn't mean the person who actually signs the appraisal? It has to be actually submitted?

MS. HINES: I don't think that that statute requires that. No, Your Honor.

THE COURT: Well, didn't these individuals have to have an appraisal filed as part of -- part of their tax work?

MS. HINES: Yes.

THE COURT: Wasn't that signed by Mr. Clark as alleged?

MS. HINES: Mr. Clark signed most of the appraisals prepared.

THE COURT: Did Ms. -- I mean, did Ms. Zak sign any of them?

MS. HINES: I'm not aware of any facts that suggest she actually signed them. But, Your Honor, just because you are not a signing person on the appraisal doesn't mean that you didn't help prepare or prepare that appraisal.

THE COURT: So basically you are saying it is a factual issue. It is not a legal issue. But you -- still basically your allegations were about originally I thought as assisting. But you are saying that she actually prepared it?

MS. HINES: The allegations are that --

THE COURT: I should construe that in your favor, that she actually prepared the appraisal even though it did not have her signature on it?

MS. HINES: She is not a signing appraiser that we are aware of. But yes, that is why the allegations don't make that allegation. So the allegation is that she assisted in this appraisal process by preparing the highest and best use determination and that that should be under the statute sufficient for meeting the allegations under 9(b). And then as a factual matter on the merits, it may turn out that she's not engaged in 6695A penalty conduct. But that is not today's issue that we have to resolve.

THE COURT: Do you have any more -- anything more you want to say?

MS. HINES: That is it on that. Did you have any more questions?

THE COURT: No. No. I will hear from the defendants in response. But that is fine.

MS. HINES: The next issue that was addressed was the disgorgement with *Kokesh* and the statute of limitations issue. And I think this is another important point to point out. *Kokesh* and securities law with the disgorgement at issue there is completely different than here where the aggrieved parties is the United States Treasury.

Money is being paid out for refunds or money is going uncollected as a result of defendants' conduct. And so the party being compensated is the IRS -- or I'm sorry -- the United States Treasury. So kind of where you are with the disgorgement -- in the securities context where you are in disgorgement with the tax laws is completely different. You are in a different situation.

And it is meant to be compensatory and restore the status quo by restoring to the Treasury. In *Kokesh* and you are dealing with securities law, the market is harmed and the investors are the ones that is out the money, not the SEC.

They may have this investigative component there. But there is also -- that is kind of a side issue. It is not the main point here, which is the Treasury is who is harmed by the refunds paid out of the taxes not collected.

I think the -- you know, the issue about expenses versus gross receipts, I do think that is also a factual issue that will come out throughout the litigation in this court and doesn't have to be something that is decided today.

But disgorgement as it is defined typically refers to gross receipts. And then there are different instances where expenses are allowed or not allowed depending on the actual situation and circumstances surrounding the scheme.

THE COURT: Well, do I in any event need to -- in your judgment rule on the *Kokesh* issue in terms of the statute

of limitations at this point? Will it make a difference in terms of the litigation and scope of the discovery?

MS. HINES: If the -- if it is held in abeyance at this time, I think discovery could potentially encompass gross receipts that go back to 2009. So that could extend the time period for which there is relevant information about the receipts.

Now, that said, that conduct may still be at issue and relevant to our claims for the injunction. So it may not unreasonably expand discovery because we would be looking at -- you know, for example, part of our allegations are the amount of the capital contributions that the partnership gets with ratio to the tax deductions that the investors get later.

So we're still going to be looking for that information of what kind of capital is being raised by these partnerships going all the way back. And presumably some amount of that is the fees that were earned by all defendants.

THE COURT: All right.

MS. HINES: I do think, Your Honor, there was also an issue of the broader statutory authority argument under 7402. And as we pointed out in our opposition, there are countless cases that have allowed disgorgement in the context of the tax law. Some of which have come after *Kokesh*. The majority of the disgorgement in the tax law arena relates to tax return preparers. But there are instances of disgorgement with a

promoter injunction suit. Most notably, the *RaPower* decision out of Utah that we had previously talked about this afternoon for the scheduling order issue. And --

THE COURT: What was the date of that decision? Was it pre-*Kokesh* or not?

MS. HINES: It is post-*Kokesh*. In fact, there is an underlying order dealing with the application of *Kokesh* with respect to a jury trial. So it is a 2018 decision. The one dealing with whether *Kokesh* applied for purposes of determining whether the defendants were entitled to a jury was March 7, 2018, and the final findings of fact and conclusions of law October 4, 2018.

I think finally just to talk briefly about 6694, we laid out most of our position in our opposition that just because you are subject to penalty under one code section doesn't mean you don't also meet the definition of another code section.

And, you know, the defendants here seem to almost take a position that they should be allowed to dictate how the IRS proceeds and how the IRS should move forward, that they didn't penalize the clients first before this injunction suit. And that is not a prerequisite for filing this injunction suit. Nor is it necessarily that there is always penalties with injunction suits later.

The IRS has the ability to proceed under a multitude

of statutes and seek a multitude of different relief. And the IRS has directed this suit, has authorized us to file it. This is what we're here about. These are the issues. And the statutes are written, and they cover this conduct, even if the defendants wish it didn't cover this conduct. It does. And so they should be left in the suit at this point and let it proceed to fact discovery.

THE COURT: You may well be right there. But in terms of assessing the value of your case and the way a fact finder might react to it, the fact that somebody had never been penalized, never gotten a notice might just in terms -- might be offensive to many taxpayers sitting on a jury. But it doesn't mean you are wrong. It just simply might be considered as whether somebody had willfully violated the law.

MS. HINES: I would agree, Your Honor, that I think that, you know, the standard under 6700 is knew or had a reason to know. And that would certainly be a factor that could come out. And the fact finder takes it for what it is worth.

Thank you.

THE COURT: I want to ask a few questions about discovery, but I want to first just hear briefly back from Ms. Zak's counsel in response to your contentions as to the -- the appraiser participating in the appraisal subject. Just briefly, if you would respond to that. Then I want to have Ms. Hines back.

MR. CLUKEY: Thank you, Your Honor. As I understand it, the Government with respect to the appraisal -- the only allegations in the complaint are basically 193 through 196. It is six or seven sentences in the entire complaint. We would submit, Your Honor, that on the basis of Rule 8, it requires substantially more than a couple of sentences in a complaint. Under *Iqbal* and *Twombly*, you have to allege conduct that is plausible. And these few sentence that are bereft of any kind of detail whatsoever provide absolutely no way that a person could defend against these kind of allegations.

I also take issue with the way that the Government described what it means to be an appraiser. I don't believe that the authorities -- the Government didn't cite any authorities in its brief, first of all, that would support that. I don't think the authorities, if you were to look at them, would support the Government's contention.

THE COURT: Thank you.

MR. CLUKEY: Your Honor, may I also add one -- just address a couple of other points?

THE COURT: All right.

MR. CLUKEY: I will be very brief. And actually, Your Honor, you had asked earlier about Paragraph 82. If I could just clarify that very quickly.

If I understand the Court's question, Paragraph 82 which talks about on Page 29 the possibility of partnerships

being able to dispose of the land -- if I understand the Court's questioning, you had a question about whether that affected the perpetuity requirement. So this -- as I understand this paragraph here, this doesn't go to perpetuity. This is simply what may happen later. If you accept these facts as true, what may happen later in connection with the partnership, the land can be sold. The conservation easement is separate. That attaches in perpetuity. Then the land in total is sold. But the conservation easement, whoever buys it, still gets the conservation easement. They can't develop the land.

So this paragraph doesn't go to perpetuity. And I don't believe when you read the surrounding paragraphs that this paragraph really concerns that issue.

THE COURT: So explain to me what you think that means again. Because I'm not sure what you -- the way you construe this.

MR. CLUKEY: So accepting with respect to Partnership Y the land -- the underlying land could ultimately be sold, the conservation easement would attach to -- and that land typically has some land cut out.

THE COURT: Right.

MR. CLUKEY: So if the entirety of that parcel is sold, the land on which the conservation easement attaches -- that can't ever be developed. This doesn't go to the

perpetuity requirement.

THE COURT: So if there was a house on the land, they would be able to sell the house you are just saying and that wasn't in the conservation easement area?

MR. CLUKEY: Right. So conservation easement -- so the land on which conservation easements exist are sold all the time for obviously a very low value. And you can buy that land because you back up to it, for instance. But you can't ever develop that land. You can buy it. But you can't develop the land. So I think it is two different issues, the sale versus the perpetuity issue.

THE COURT: That is the way you view Paragraph 136(e), as well, which again said the manager of the syndicate had the ability to dispose of that only asset without the approval of the partners after a period of years after the -- after the conservation easement was granted.

And I understood that to be implying at least that the manager of the syndicate could dispose of the conservation easement. But you are saying that is not really --

MR. CLUKEY: Right. I think this holds true, the same thing for the earlier paragraph. The conservation easement still exists on the land. According to this particular structure, you can sell the land with the conservation easement but you can't ever develop the land on which the conservation easement attaches.

THE COURT: All right.

MR. CLUKEY: With respect to the Government's point about 9(b), I think Government counsel started off with the fact that they have assumed arguendo that 9(b) applies, Number 1. Two, they have alleged fraudulent statements throughout the complaint. They have alleged fraud. They have invoked the statute 6700. Which part of it concerns false or fraudulent statements. I don't think it is an answer to say, oh, but we said or false that that gets you out of the requirements of Rule 9(b).

The last point just with respect to disgorgement, the Supreme Court in *Kokesh* said that this is -- this involves a public wrong. Even though there are individual investors who are armed, it is not an individual -- the violation is not against the individual. The violation is against the United States in that context.

In addition, the damages -- and the court talks about exactly what happens to the damages in the SEC context. Sometimes they go to the individuals. But the court makes -- I think highlights the fact that that is not always the case. The funds often go to the Treasury and exclusively to the Treasury. Sometimes the monies get paid out to individual investors. But that is not a requirement and often doesn't happen.

So I think we're squarely on all fours with that fact

pattern with respect to what happened with the money here. The money -- the disgorgement in this context as the plaintiff has pled would go to the Treasury.

THE COURT: Well, let's say I agree with you so that it is a shorter period of time as a statute of limitations. Ms. Hines argues that it still potentially would be -- going past five years still would provide relevant information, wouldn't it?

MR. CLUKEY: So I think if I understood Ms. Hines correctly, she said with respect to gross receipts and that information, that would be cut off after five years. They would not be entitled to go after gross receipts. But that wouldn't really be relevant.

Whether there is other conduct that might be relevant past that, I understood the Government's position to be yes, there might be other conduct or related conduct that would go past the five-year standpoint -- the five years. And that may be possible.

THE COURT: All right. So since you are up, let me just ask you this: You-all protest the scope of the discovery that the Government wants. Let's say I even grant some portion of your motion and allow the Government to replead.

I have got you here today. What are you saying is an appropriate scope of discovery? You don't want 50 depositions, and you don't want the same length of period of time. But

obviously they have alleged a complex, far-flung set of business arrangements. And to the extent fraud is involved, of course, one could argue that they need more evidence rather than less in order to be able to prove their allegations.

MR. CLUKEY: Your Honor, I think one thing with respect to the scope of discovery, it is important to keep in context what has happened prior to the filing of this case. This isn't like a normal litigant. This is the United States Government.

First of all, you have various audits, and you have the IRS engaged in audits. Secondly, you had the IRS literally for years -- approximately four years investigating the various defendants here in this case. What those IRS agents were doing was obtaining information, asking various participants in the transactions questions, interviewing them, deposing them in some instances.

I believe this Court actually handled the case with respect to Mr. Greenberg in which he opposed a summons that was issued to him for information. That is all related to this case.

The Government has been involved in obtaining information and discovery literally for four years. And now it is coming to the Court saying, oh, we need all this information. I think it is a little bit disingenuous to take that approach.

50 depositions to me seems somewhat shocking. One, you have the costs. What kind of costs are going to be imposed on the various defendants here if they all have to defend 50 depositions? That is a crippling cost. Secondly, what are they going to do with 50 depositions? How is that information going to be presented to the Court? What does the Government think it is going to do as far as the presentation of its case?

It has alleged 96 transactions. Is it intending to litigate 96 transactions? A single transaction as litigated in the tax court often takes a week, sometimes more. They are talking about 96 or more weeks of trial.

Certainly that would be crippling to the individual defendants. And I don't think the Court would have the patience or the ability to litigate this case for two years. So I can't tell you -- I haven't given as much thought to what the scope of discovery should be. I think the EcoVest defendants really have spent a lot of time in this and probably would be a little better to address the issue. But I think just from that general standpoint what the Government has asked for here is an overreach.

THE COURT: All right. Could I hear from EcoVest about what you believe is the appropriate scope.

MR. RAZI: Thank you, Your Honor. I would be happy to address that. And as I do it, let's just set the stage and put this in a bit of context.

This case was filed six months ago. So we have been at this with them for six months. And the way it was filed was it was filed and there was a press release put out accusing these good people who have never done anything wrong in their lives of fraud -- okay? -- and flipping their life upside down and cutting off all their business activities, cutting off banking relationships, freezing their life in place. And they came to us and said, what do we do? I said -- you know, we said, did you do it? What is this all about? They said no, it is all wrong.

Okay. The fundamental allegations in the complaint are that they lied to people, that they knowingly made false statements, and that an appraiser had these wildly excessive appraisals that were 200 percent or more of the value. Those are the real two issues in the case.

There is some interesting legal discussion that we heard this morning. And, intellectually, I get why the Court is interested in that. But at the end of the day, at least as it relates to our clients, there are fact disputes. They have been accused of fraud by the United States. Six months ago, the United States Government steps on them and accuses them of that.

And now the United States is saying, even though we did that, even though we broadcast this to the world, we are not ready to prove our case. And we came to them. We came to

the Government the minute we got the complaint and said, we want to talk to you. We want to get this case moving. If you think there is this big fraud that needs to be enjoined, we're ready to do it. Let's go. We'll bring our guys in. They'll talk to you. We'll put them on the stand, and they'll explain to you why they did what they did and why it is all legal and why there is no precedent for this Government case.

So what is the appropriate scope of discovery? As counsel alludes to, no way we're going to have discovery or a trial about 96 separate transactions. Right? That is preposterous. That would be an extraordinary waste of this Court's resources, most importantly.

So there is going to need to be some selection done. Right? There is going to need to be some focus. The lawyers are going to have to look at the transactions and pick what they want to show to the Court. And that is our job as advocates.

Certainly our clients -- I should say we produced even without -- I know there was some back-and-forth with the Court and people were saying we're not ready, we're not ready. We just went ahead and produced all the transaction documents more than a month ago. There is no mystery about what our transactions are. For each one, there is, you know, a sophisticated set of documentation, including legal opinions, by the way, saying that all this is properly deductible and

fine.

So that is what the evidence is going to be. So the discovery should be -- and fortunately the Federal Rules address this already, that we're not just writing from scratch. We don't have to go to a solar panel tax case that counsel who happens to be in the room handled. Ten depositions, I think, is the default under the rules. Certainly that is plenty. There hasn't been one taken yet. So there is no showing that more than ten is required.

But most importantly we don't so much care about the number of depositions or the number of discovery requests. We just have to get on with it. It needs to be done expeditiously. The United States can't accuse someone of fraud and then just hang back and say, I'm busy, and I'm not ready to do it, and no, we need more time.

If you are going to accuse someone of fraud and you are going to put out a press release, you have got to be ready to come to court and put up or shut up. That is our system. That is the only way it is fair.

So however many -- if they want 20 depositions, just get them done. The default in the rules -- again, people have thought about this -- is a four-month period for fact discovery. That is 120 days. This case is six months old. There's plenty of time to do this. We just have to do it.

And this idea that, you know, these big numbers that

we're going to have -- in a case in which there is a fact dispute about intent and valuation, we're going to have this long discovery period. These issues are coming to you, Your Honor, ultimately. Nothing is going to happen in a deposition that is going to win anyone's summary judgment on intent. Nothing is going to happen in a deposition that is going to resolve -- that is going to enable anyone to find as a matter of law that any appraisal was 200 percent or more exaggerated.

Those are fact questions. There is going to be a trial, and we need to efficiently move through this case so we can present it. And if the Government is right, there will be injunctions issued. But I submit that the evidence will show that they are wrong. And they are wrong a million percent. And we look forward to the opportunity to present that.

But it can't just be this indefinite thing where the internet on Google the United States Government says my clients are fraudsters and that just hangs out there indefinitely while the Government figures out who its witnesses are for 9 months or 12 months or 6 months or whatever. We have to get on with this.

THE COURT: Thank you.

MR. RAZI: You're welcome.

THE COURT: Ms. Hines, would you talk about discovery from the Government's perspective.

MS. HINES: Yes, Your Honor. From the Government's

perspective, we have requested a nine-month fact discovery window with a three-month of additional discovery time for experts. We requested 50 depositions. And, otherwise, I believe everything else in the joint preliminary report and discovery plan --

THE COURT: 50 depositions before experts or after experts?

MS. HINES: We just said 50 total. Your Honor, you know, the United States counsel in this case has done a fair number of these promoter injunction suits. And we have experience with both the length of time and the number of witnesses that are required in these types of cases.

This case doesn't involve only people in this jurisdiction. It involves people throughout the country that are going to be required to be deposed in order to make an admissible record for this Court.

In terms of how we present the evidence at trial, there are lots of avenues. And we can discuss with counsel after there has been some initial discovery about the transactions before we start narrowing down and deciding if and what exemplars might be appropriate.

There is also summary evidence and other types of ways that we can present evidence to this Court in a coherent manner that doesn't require us to, say, have all 96 transactions at issue.

And importantly for us to succeed on our claims and have an injunction issued, we don't have to show that every 96 were incorrect. We have just got to show and meet the factors required by the statutes and then the equitable factors in the Eleventh Circuit for injunctions.

THE COURT: Would you agree that this is still ultimately a fact issue -- a set of fact issues in dispute so that the depositions really are ultimately going to be focused on capturing testimony that you may or may not use at trial. It is hard for me to see given what I have seen so far that I would be able to rule as a matter of law.

MS. HINES: Well, Your Honor, promoter cases have, in fact, been susceptible to rulings on summary judgment. There have been a few of them. The *Tarpey* case that we mentioned earlier. There is a case out of Ohio called *Elsass* that was resolved on summary judgment. There's also cases that deal with fraudulent intent being resolved on summary judgment. So I don't think it is impossible for this to be resolved on summary judgment.

THE COURT: So what are the nature of the depositions that you are looking to take in that 50 beyond the experts?

MS. HINES: Beyond the experts, Your Honor, we would want to take depositions of the defendants. Then there are customers, the ultimate investors in the transactions. As alleged in our complaint, there are thousands of those.

Obviously we're not going to take all thousands of those, if we have only asked for 50. There are also the broker/dealers and other financial advisers who were basically kind of selling this or what we would refer to in these cases as subpromoters. There's other appraisers who are involved. There's the people who have given advice on these transactions, the lawyers or the accountants or whatever who have written the opinion letters. Those people would also be people we would be looking to depose.

THE COURT: You don't think you are going to walk into a wall of attorney-client privilege under these circumstances?

MS. HINES: No. In fact, Your Honor, in these circumstances, attorney-client privilege when they use a marketing opinion, which is what most of these transactions are, an opinion used to market the transaction, there is a limited amount that the attorney-client privilege actually comes and extends into those types of work product.

But that is a potential issue, which is another reason to have a longer discovery period. So that when we have that issue, we can try to resolve it. And if we can't, we can come to you and ask for some assistance.

THE COURT: Well, you have heard the defense counsel argue that the customers are really irrelevant. This is not a circumstance where the customers are -- that the claims of the

customers have been defrauded.

What is the relevance of the customers here in terms of the depositions?

MS. HINES: So under the count with the 6700 penalties -- so that is Count I of our complaint where we have sought an injunction under 7408 -- the question is whether people have made or furnished a statement or caused others to make or furnish a statement. And those customers are the people who received the statements. They are the ones who are hearing from either the defendants directly or from these subpromotors who are hearing from defendants.

So their relevancy is what were you told, what were you told about this deduction, how was it marketed to you, what actually happened in the transaction, what happened after the transaction.

THE COURT: And connect that up with the law again to me. Because this is not about them being defrauded still. I'm just trying to understand what you are saying because you are connecting it to a statutory provision that I don't -- I'm not going to just be able to project the clause in my mind at the moment as to how it is relevant.

MS. HINES: Right. So 6700 penalizes conduct which is the organizing or participating in the sale of an entity or plan or arrangement in which a statement was made and that statement is either false or fraudulent or a gross valuation

overstatement.

So the person who receives the statements, the customers, can tell us what those statements were. Which kind of the statements is one of the key issues in this case. What were they told? What were they told about this transaction and how it would work? How was it marketed to you? That is an important part of our case.

And, in fact, in a lot of these promoter cases, the majority of our depositions or at least a good portion of them are of customers.

THE COURT: Well, is there a difference between the promotion -- the impacted promotion schemes and these other cases where the different -- really different subject matter than here? I mean, I can understand what the plaintiffs -- the defendants are saying here.

So I'm trying to -- I'm trying to understand what really does Susie Jones who happened to buy an interest -- what does she have to add? Because she is getting the materials that you are aware of. She may have had the broker say something to her.

But all of that is primarily available in documentary evidence. I'm not sure what her recollection, which is likely dated, is going to add to anything as a reliable piece of evidence in the context of this specific case.

MS. HINES: And to be sure, there are definitely

documents that are going to contain statements. But the statements under 6700 are not limited to written statements. Oral statements, what you are told about what you are getting if you invest in this, that could be a material matter that is a penalizable statement under 6700.

THE COURT: And if the broker who is not a defendant has said it, you are going to hold these individuals responsible?

MS. HINES: The statute penalizes if you make or furnish it or cause another to make or furnish it. So potentially, yes. Depending on if the broker was caused to make that statement by one of the defendants, it reaches that conduct.

THE COURT: All right. Well, I think I won't approve this -- anything that involves 50 depositions. So I don't have much more view about this at this point. I'm going to look at what you have provided. But it seems to me that that is excessive and not necessary for purposes of the way this has been alleged here.

So I haven't gotten a lot of clue, frankly, from the defendants of what you think is appropriate. And I would -- I would really urge the Government to rethink a discovery plan that tells me more particularly how you are going to proceed.

It is not that the nine months is necessarily unrealistic if it was true. But 50 is just -- you're talking

about that you will take 50 depositions?

MS. HINES: Yes.

THE COURT: That doesn't even deal with what they are going to take. And if you put up 50, then I can well imagine what happens next. And I basically think you'll be -- especially if you think there are some things that are going to be capable of the Court's reviewing this on summary judgment, it will make an impossible load. I basically would be in a position where I would have to tell you to go to trial, unless there was something terribly narrow that was clearly a matter of law.

So I don't really think it is in your interest -- the Government's interest either to have some -- create a record that is so factually complex that it becomes almost undoable as a matter on summary judgment. Now, there may be some narrower issue. And I don't know what it is at this juncture because I'm, you know, obviously at a very early point in the lawsuit.

I just have really strong concerns about manageability. I would have to understand proportionality to have to know what we would really have to understand before I even -- you know, in a situation where I'm seeing dozens and dozens of depositions, I would have to really understand what are the exemplars that you are going to use. What's the framework of the discovery?

And I'm not trying to limit you. But I think clearly

the Government intends to go beyond the three examples in the complaint. So if I understood what they were and they understood what they were, it would be very helpful in helping you-all frame that. Now, there may be something you can proceed with now since apparently there is some willingness on the part of EcoVest to at least proceed.

I am concerned if I grant any portion of the motions to dismiss or just simply say that there are some things that have to be repled that I'm going to have to at least give you a very quick time frame for doing that so that we can get going.

But, anyway, that is my general view about the scope of discovery at this point. And I think obviously there has been -- has been a lot of information collected as well. So I'm not sure it is really needed. But I'm going to read all of the materials that you provided. And maybe I'll have a somewhat different view after I review them. But that is my general thought about this.

Do you have a sense of how many exemplars that you really would like to use?

MS. HINES: Not yet, Your Honor. I mean, I think that part of what -- the EcoVest production, for example, included some more recent transactions. We have some issues with the production being redacted in portions. And so we're going to have to go back to them and kind of be able to take an initial look through some of that before we can have, I think,

a substantive conversation on that.

THE COURT: Okay. Well, I think it is something as you look at the materials that they provided that you should be thinking about what is -- what is the number of exemplars so that -- and, of course, you should as well.

What would be -- from your perspective if you don't think that you should be hung on three different transactions, what are you saying would be sufficient without basically swamping the boat but providing you fairness?

Yes, Counsel.

MR. RAZI: Yes. Thank you. On that point -- and I do think it is where we're going to end up is some kind of sampling. But we are flexible in terms of the number. You know, five seems to make sense to me with some input by both sides.

But on the discovery schedule, if I could just say one thing. The Court said that defendants haven't given much guidance about the schedule and what is entailed here. And I would just push back a bit on that respectfully.

THE COURT: No. You have. We should be able to do this in four months.

MR. RAZI: Right. And it is going to involve depositions of our clients who are here and ready to be deposed at any time. But they are the only ones that are ready. No one else wants to do it. It is going to involve depositions of

their lawyers, who are again ready to be deposed.

And what I would suggest on all of that though is that why not wait until we actually need more. Why not get started. The rules provide for ten depositions per side. Let's take them. And then we'll have a better understanding of whether more is actually needed and why.

We're reasonable people. If the Government came to us and explained how there was this 11th witness out there that had all this critical information that needed to be deposed, we will consider that in good faith. And the Court will certainly let them do it if we ever get to that point. So why not wait. We don't need to decide in the abstract and just figure out how many depositions are going to be needed. We need to just set the schedule and get on with it.

THE COURT: All right.

MR. RAZI: Thank you, Your Honor.

MR. HICKS: Your Honor, if we can stick to the default of four months and ten, my client will agree to it. Our concern is cost. Right. So if we can get to it, fine. We'll get to it, despite our motion to dismiss.

THE COURT: But are you wanting to be assured that there will be no more than ten? Because I can't assure you that.

MR. HICKS: No. No. I think it is correct. If you say let's start off with ten and if somebody has good cause for

an 11th or 12th, they come to you. That is the way that normally works. And I think that would be a fine way to start.

THE COURT: So is the Government interested in simply getting going at least even -- whether or not I agree with this 12 business but that basically we start with some more limited framework and then we reevaluate and we determine how many -- at least in the next two weeks how many exemplars you really are thinking about?

MS. HINES: Well, I think the problem with just saying let's start with ten and come back if we need more is that what if we don't get more and we have used our ten. You know, I mean, six defendants in this case. That is more than half of what is allowed by the rule. And so I mean right there we're going to be -- what? -- allowed one customer, one broker/dealer, one attorney, and one other person.

THE COURT: Well, I don't really agree with them about the ten. I'm really agreeing with them there might be a value in having at least a somewhat more limited number and for me knowing how many exemplars you are really thinking about so that I can -- now you have identified what you want for each one of these so I get a better understanding of what you are really imagining that you are going to do and how many experts would be involved. Are they all around appraisal? Or what are they around? So I can understand -- just to get a much more factually textured vision of what it is that the Government

wants, other than just there is a lot of things out there who are going to want a lot and it is going to be 50. Then they can take what they are going to do. That is just it seems to be a recipe, as I said, for the case not being manageable.

MS. HINES: Well, Your Honor, just to give you some context, we made our initial disclosures on April 22nd and identified, you know, 20 either individuals or categories of witnesses that may have discoverable information. Six of whom are the defendants. Then the syndicates themselves, we identified all 96 of those. We identified a series of customers. I think it was 140 customers in the initial disclosures. And most of those relate to one transaction. 34 broker/dealers who were out there that we know of at this point. Two advisers. Eight land trusts who are receiving the easement donations. Then there's employees of these entities that we may want to speak with as well.

So I mean, we did try to look at the factual context of even taking a smaller number of transactions. How many people might we actually want to talk to, especially those who are outside of this district and whose testimony we want to get on the record and make it admissible?

So I do think -- I hear what you are saying that 50 seems hard and a lot to ask for. But given the scope of this particular transaction that has gone on since 2009, $2 billion of federal tax deductions claimed as a result of this conduct,

and dealing with thousands of investors, we do think 50 is proportional and factually supportable.

THE COURT: All right. You can provide me with the disclosures. I don't have them. They are not filed on the docket.

MS. HINES: Your Honor, we did not file them because they contain the personal information.

May we submit them to chambers?

THE COURT: Yes, you can.

And EcoVest did disclosures, as well?

MR. RAZI: I think we filed ours, Your Honor. We're happy to email them.

THE COURT: If they are on the docket, that is fine. And I would just simply -- suggest simply so that I have them you can move to file -- I will approve your filing them under seal so that they are actually on the docket but under seal.

MS. HINES: Okay. We'll file those, Your Honor.

Did you have any other questions?

THE COURT: I wanted to know whether the other defendants had filed anything in terms of disclosures.

MR. CLUKEY: We have not, Your Honor.

MR. HICKS: Nor have we.

THE COURT: All right. Well, this has been helpful. I'm going to spend a little more time looking at the briefs. And I am thinking about discovery issues as well.

I don't really know how exactly -- of course, once we commence discovery, how many discovery disputes there will be. And I can't right now just consume all of the time of a magistrate judge in discovery disputes. And I have an enormous criminal caseload at the moment.

So I just want to say that if you end up being in a position of enormous amounts of disputes we're going to have to think about whether I need -- you are going to have to pay for a special master, what we're going to have to do. I hope that is not going to be necessary because it is the Government involved and taxpayer funds. And I'm being told that some of the people here don't have endless resources.

But I want to say this just from the outset. Because even though I'm a big believer in getting involved myself in the discovery issues and trying to have -- and not -- and being able to head off all discovery -- formal disputes because just basically it bogs a case up so much, I'm concerned given the volume of discovery that we could get into that situation.

So it is just basically a flag to you that I do require if you end up being in discovery disputes for you to attempt to resolve it, to not file motions to compel or a motion for protective order but to contact the Court, and that we have an informal discovery dispute resolution process. But if we're basically having disputes every two weeks, I won't have any alternative as to how I handle it.

If we have any further questions, I will let you know. I just want to talk to the law clerk involved in the case for a second. All right.

(There was a brief pause in the proceedings.)

THE COURT: Did you have something more you wanted to add?

MR. RAZI: Yes, Your Honor. I was just going to ask whether at least EcoVest and the Government can resume discovery. We had begun discovery. And then the Court entered a minute entry a few weeks ago stopping it. And I would just respectfully submit that I don't see any purpose that is being served at this point in waiting. In other words, if there are hard questions -- hard factual questions that need to be resolved, we ought to get started doing that.

THE COURT: All right. Well, this is my view about that. You certainly can exchange any documents you want and continue to discuss the redaction issues, anything else like that.

I'm concerned about proceeding with depositions without really having at least made a determination as to -- even if I haven't issued anything as to the merits of the case. Because I can just -- even though everyone says, well, we'll attend and we'll be there, I can just see any number of problems about that if I don't at least have a sense of where I'm at in the case.

MR. RAZI: The document work gives us plenty to do.

THE COURT: But the document work is -- there is plenty to do on the document work.

MR. RAZI: Unquestionably.

THE COURT: Yes. So I'm going to continue the global stay with this exception, that the Government and EcoVest is fully authorized to proceed with document discovery and resolve all of the documents -- any document issues, redaction issues, confidentiality issues. And I'm also available if there is any need to raise any of those issues.

MR. RAZI: Thank you, Your Honor.

THE COURT: All right. So you are going to -- as I understand it, all of the defendants have their -- to the extent you've had disclosures, they are on -- I'm going to get -- the Government is going to file one under seal, and EcoVest is already on the docket you believe?

MR. RAZI: I'll check. Then if it is not, we'll put it there.

THE COURT: All right. Very good. And I think that would assist me, as well. And I'll try to make some determination as to how we're going to proceed with the global stay and reviewing the next of your materials in the next ten days.

There is a possibility I will require the Government to file an amended complaint. How does that impact anything?

I mean, that is why I am saying go ahead with the documents. But I can understand why that might affect or might not affect discovery proceeding. So that is the last thing I want to throw out.

MS. HINES: Your Honor, to the extent that an amended complaint is required, it is possible that it will impact discovery. I think though if I'm understanding at least, you know, the argument of opposing counsel, if it is really just the particularity issue, it may just be, you know, adding more examples or whatever. So I'm not sure that it necessarily will change what we have to decide in terms of exemplars or how much or how many.

It may expand that in the sense that, you know, if we are starting with the assumption of at least three and we have now more examples, it may make it a larger pool of exemplars. I don't know.

Quick question, Your Honor. You did ask in your order this morning for hard copies of all of the materials we talked about at first.

Do you still want those?

THE COURT: The materials that were referenced in your footnote? And I think that you provided them, didn't you?

MS. HINES: We electronically filed them. But the order also said to bring hard copies.

THE COURT: If you have them, sure, we would like an

extra copy.

MS. HINES: We'll get that for you.

THE COURT: Anything else from other counsel?

MR. CLUKEY: No, Your Honor.

MR. RAZI: Only one final point. As you peruse the cases that were filed this morning, just bear in mind that in many of those cases the parties agreed about the scope of discovery. And different defendants have different approaches.

Sometimes when the Government sues people, they just sort of run and hide. Other people come and vigorously defend themselves. And we are prepared to do that.

So this isn't a situation -- there is no agreement here that there should be a million depositions and it should go on forever. Many defendants want cases to go on forever because they would rather not come to a resolution. That is not our logic.

THE COURT: All right. Very good. Thank you.

All right. Thank you very much. I appreciate everyone -- lots of people coming from out of town and the thought that was given to the discussion today. Thank you.

(The proceedings were thereby concluded at 4:25 P.M.)

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 89 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 26th day of June, 2019.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT